



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# **Memorandum**

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## Federal Highway Administration and Federal Transit Administration

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Subject: Integration of Planning and NEPA Processes

Date: February 22, 2005

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In Reply Refer To:  
HCC-30

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### **I. ISSUE**

You have asked for guidance regarding the extent to which the results of the transportation planning process can be used in and relied upon in the NEPA process. In response to your request, this memorandum outlines the current law; describes the transportation planning products that can be used in the NEPA process and under what conditions; and explains the roles of Federal agencies and the public in reviewing transportation planning products used in NEPA analyses and documents.

### **II. BACKGROUND**

The transportation planning process required by 23 U.S.C. 134 and 135 and 49 U.S.C. 5303-5306 sets the stage for future development of transportation projects. As part of the transportation planning process, States and local metropolitan planning organizations (MPOs) must develop long-range transportation plans to address projected transportation needs. In addition, they must create transportation improvement programs (TIPs or STIPs), which identify a list of priority projects to be carried out in the next three years to implement the plan. To receive Federal funding, transportation projects must come from a TIP or STIP. As a result, much of the data and decisionmaking undertaken by state and local officials during the planning process carry forward into the project development activities that follow the TIP or STIP. This means that the planning process and the environmental assessment required during project development by the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4231 *et seq.*) should work in tandem, with the results of the transportation planning process feeding into the NEPA

process. Congress has put great emphasis on the transportation planning process for shaping transportation decisions, and has retained and refined that emphasis in surface transportation law over decades.

In practice, though, the environmental analyses produced during the NEPA process are sometimes disconnected from the analyses used to prepare transportation plans, transportation improvement programs, and supporting corridor or subarea studies. Analyses and decisions occurring during transportation planning can be ignored or redone in the NEPA process, resulting in a duplication of work and delays in implementation of transportation projects. The sharp separation between the work done during the transportation planning process and the NEPA analysis and documentation process is not necessary. In fact, current law provides authority for and even encourages the integration of the information and products developed in highway and transit planning process into the NEPA process. This memorandum provides guidance on how this information and these products can be incorporated into and relied upon in NEPA analyses and documents under existing laws.

### **III. LEGAL ANALYSIS OF CURRENT LAW ON INTEGRATING PLANNING AND NEPA**

The transportation planning process is a detailed, Congressionally mandated procedure for developing long-range transportation plans and shorter-range transportation improvement programs. These procedures were initially enacted in the 1960s and were codified in Title 23 and Title 49 of the U.S. Code. See 23 U.S.C. 134 and 135 and 49 U.S.C. 5303-5306. In 1991, the planning provisions were substantially expanded by the Intermodal Surface Transportation Efficiency Act of 1991. They have been subsequently revisited and refined by Congress in various transportation bills, but the basic framework has remained intact. The procedures identify the State and local agencies with primary responsibility for transportation planning. They also identify agencies and other interested parties who should be given an opportunity to participate in the transportation planning process and describe their appropriate level of involvement. The statute spells out the planning factors that must be considered, including, among other factors, the protection and enhancement of the environment. 23 U.S.C. 134(f) and 135(c).<sup>1</sup> The transportation planning process undertaken by States and MPOs is periodically reviewed and, if found to be adequate, certified by FHWA and FTA. The Federal government does not approve the transportation plans developed by State or local officials, and although FTA and FHWA jointly approve the Statewide TIP such an approval does not constitute a Federal action subject to review under NEPA.<sup>2</sup> This is the process that Congress constructed to shape transportation decisions for Federally-funded projects.

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<sup>1</sup> Protection of the environment is reinforced in the FHWA and FTA regulations clarifying the factors to be considered in the transportation planning process (e.g., States and MPOs must analyze the “overall social, economic, energy and environmental effects of transportation decisions....” 23 CFR 450.208 and 450.316.

<sup>2</sup> As stated in the planning provisions of Title 23, “[a]ny decision by the Secretary concerning a plan or program described in this section shall not be considered to be a Federal action subject to review” under NEPA. 23 U.S.C. 134(o); see also 23 U.S.C. 135(i). These provisions are discussed more fully in Section V of this memorandum.

In order to be eligible for Federal funding, projects must come from a plan created by this process. Federal action subject to NEPA is needed to approve these Federal aid projects. Because of the continuity between the planning and project development processes, the NEPA analysis for a transportation project needs to be reviewed in the context of this transportation planning process.

NEPA and the government-wide regulations that carry out NEPA (40 C.F.R. Parts 1500 *et seq.*) clearly contemplate the integration of the NEPA process with planning processes. Specifically, Section 102(2)(A) of NEPA direct all Federal agencies to “utilize a systemic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in *planning* and decisionmaking.” [Emphasis added] The regulations issued by the President’s Council on Environmental Quality (CEQ) amplify the statutory directive:

- 40 C.F.R. 1501.1(a) requires decisionmakers to “integrate[e] the NEPA process *into early planning* to ensure appropriate consideration of NEPA’s policies and to eliminate delay”;
- 40 C.F.R. 1501.1(b) emphasizes the need for “cooperative consultation among agencies *before the environmental impact statement is prepared*”, rather than “submission of adversary comments on a completed document”;
- 40 C.F.R. 1501.1(d) emphasizes the importance of “[I]dentifying at an early stage the significant environmental issues deserving of study,” by deemphasizing “insignificant issues” and “narrowing the scope of the environmental impact statement accordingly”;
- 40 C.F.R. 1501.2 requires that Federal agencies “integrate the NEPA process with *other planning at the earliest possible time* to ensure that planning and [agency] decisions reflect environmental values....”

Likewise, the NEPA regulations adopted by the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) emphasize the tie between NEPA and transportation planning:

- 23 C.F.R. 771.105(a) provides that “To the fullest extent possible, all environmental investigations, reviews and consultations be coordinated as a single process....”; and
- 23 C.F.R. 771.105(b) directs that “Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic and environmental impacts of the proposed transportation improvement; and of national, State and local environmental protection goals.”

Thus, the organic statute, the government-wide NEPA regulations, and the specific FHWA and FTA regulations all strongly support the integration of the NEPA process with the transportation planning process.

Case law on the issue of the use of transportation planning studies and decisions in the NEPA process is not extensive. However, to the extent they exist, court decisions have consistently supported the reliance in the NEPA process on work done in the planning

process. For example, in *North Buckhead Civic Association v. Skinner*, 903 F. 2d 1533 (11<sup>th</sup> Cir. 1990), the Plaintiffs challenged the purpose and need articulated in the EIS for a multi-lane limited access highway connecting two existing highways. The purpose and need was derived from a series of planning studies conducted by the Atlanta Regional Commission. Plaintiffs argued that the purpose and need was crafted in a way that the proposed highway was “conclusively presumed to be required” and a rail alternative perfunctorily dismissed for its failure to fully satisfy the objectives of the project. The Court of Appeals disagreed with the Plaintiffs, stating that their objections reflected “a fundamental misapprehension of the role of federal and state agencies in the community planning process established by the Federal-Aid Highway Act.” The Court went on to explain that the Federal-Aid Highway Act contemplated “a relationship of cooperation between federal and local authorities; each governmental entity plays a specific role in the development and execution of a local transportation project.” The Court emphasized that federal agencies did not have responsibility for long range local planning, and found that the “federal, state and local officials complied with federally mandated regional planning procedures in developing the need and purpose section of the EIS.” 903 F.3d at 1541-42. Although the Court in *Buckhead* acknowledged the validity of a purpose and need based on the results of the planning study, it did not in any way scale back the holdings of other cases relating to purpose and need which caution agencies not to write purpose and need statements so narrowly as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence).” *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7<sup>th</sup> Cir. 1997). (In this case, the Army Corps of Engineers failed to question city’s insistence on one approach for supplying water and gave no independent thought to the feasibility of alternatives, both single source and separate source supply options. On this basis, the EIS was found to be inadequate.)

In *Carmel-by-the-Sea v. U.S. DOT*, 123 F.3d 1142 (9<sup>th</sup> Cir. 1997), the Plaintiffs challenged the sufficiency of an EIS for failing to adequately consider the proposed project’s growth-inducing effects. The Ninth Circuit disagreed, finding that the EIS satisfied this requirement by referencing several local planning documents that specifically included construction of the highway in their growth plans and which discussed overall growth targets and limits. In addition, the Court found that achieving “Level of Service C,” an objective derived from the local congestion management plan, was an appropriate part of the purpose and need statement (although ultimately the EIS was found inadequate on cumulative impact grounds). Similarly, in *Laguna Greenbelt, Inc. v. U.S. DOT*, 42 F.3d 517 (9<sup>th</sup> Cir. 1994), the court held that the absence of a more thorough discussion in an EIS of induced growth, an issue that was sufficiently analyzed in referenced state materials, does not violate NEPA. However, regardless of the source, the analysis of induced growth must be in sufficient detail and must provide an analytical basis for its assumptions in order to be adequate under NEPA. See *Senville v. Peters*, 327 F.Supp.2d 335, 349 (Vt. 2004) (In this case, the District Court found an FEIS, before it was supplemented by FHWA, to be inadequate because it contained only a “sketchy” discussion of induced growth and failed to support its assumptions with any analysis.)

In *Utahns for Better Transportation v. U.S. DOT*, 305 F.3d 1152 (10<sup>th</sup> Cir. 2002), as modified on rehearing, 319 F.3<sup>rd</sup> 1207 (10<sup>th</sup> Cir. 2003), Plaintiffs contended that the FEIS was inadequate because it failed to consider reducing travel demand through alternative land use scenarios in combination with mass transit. Noting that “reasonable

alternatives” must be non-speculative, the Tenth Circuit found that Plaintiffs had not demonstrated a deficiency in the FEIS on this basis (although it was ultimately found inadequate on other grounds). The Court stated that “Land use is a local and regional matter,” and that, in this case, the corridor at issue would involve the jurisdiction of several local and regional governmental entities whose cooperation would be necessary to make an alternative land use scenario a reality. The fact that these entities had clearly declined to alter their land use plans in such a way was justification for not considering this alternative. 305 F.3d at 1172.<sup>3</sup>

In *Sierra Club v. U.S. Department of Transportation*, 310 F.Supp.2d 1168 (D. Nevada 2004), Plaintiffs made several challenges to the EIS for a proposed highway project. One of these challenges alleged that FHWA relied on understated population and traffic forecasts. However, the Nevada District Court found that FHWA’s reliance on the forecasts and modeling efforts of the designated metropolitan planning organization responsible for developing transportation plans and programs for the area was reasonable. In addition, Plaintiffs argued that the EIS had improperly rejected a fixed guideway as a reasonable alternative under NEPA. The Court disagreed, finding that FHWA reasonably relied on a “major investment study”<sup>4</sup> conducted as part of its planning process to establish that such an alternative (1) would not meet the project’s purpose and need, even

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<sup>3</sup> Note, however, an alternative is not “speculative” or “unreasonable” merely because it is outside the jurisdiction of the proposing agency. 40 C.F.R. 1402.14 (c). In some cases, an agency might be required to consider an alternative outside its jurisdiction. For example, in *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800 (9<sup>th</sup> Cir. 1999), the Ninth Circuit Court of Appeals found that the lack of funds for an alternative was not sufficient to render it “speculative” when the Forest Service could have at least made a request for additional funding. The facts in the *Muckleshoot* case are different than the *Utahns* case, where the local agencies had clearly declined to exercise the alternative.

<sup>4</sup> Corridor-level “Major Investment Studies” were for a time required under FTA and FHWA’s planning regulations where a need for a major metropolitan transportation investment was identified and Federal funds were potentially involved. Major investment studies were intended to refine the system-wide transportation plan and lead to decisions on the design concept and scope of the project, in consultation with other interested agencies. In addition, they were intended to be used as input to EISs and EAs. 23 C.F.R. 450.318. In Section 1308 of the Transportation Equity Act for the 21<sup>st</sup> Century, the Secretary was directed to eliminate the separate requirement for major investment studies and instead to integrate it with the planning analyses required under the FTA and FHWA planning statutes “as part of the analyses required to be undertaken pursuant to the planning provisions of Title 23, United States Code and Chapter 53 of Title 49, United States Code, and the National Environmental Policy Act of 1959 (42 U.S.C. 4321 et seq.) for Federal-aid highway and transit projects.” Pub. 105-178 (June 9, 1998). Although no longer required, “major investment studies” continue to be allowed at the discretion of the State or local agency.

It is telling, however, that a good many State and local agencies continue to prepare “major investment studies” (and similar corridor and sub-area analyses) on their own volition, because they have found it very valuable to vet the merits and weaknesses of various alternatives—both modal and alignment—before they even initiate the NEPA analyses and documentation. Moreover, FTA requires Metropolitan Planning Organizations and/or transit agencies contemplating major capital investment (“new starts”) projects to prepare a planning-level corridor study, known as an “Alternatives Analysis,” either before or during a Draft Environmental Impact Statement for the purpose of narrowing the range of alternatives for study in a subsequent NEPA analysis and document(s) by eliminating some alternatives from further detailed study. See also footnote 10.

when considered as part of a transportation strategy, (2) was too costly and (3) depended on connections to other portions of such a system for which construction was uncertain.<sup>5</sup>

As demonstrated by these cases, Courts have sanctioned the use of information from the planning process in a NEPA analysis and document. This is consistent with the opening language in NEPA advocating the integration of environmental considerations in both planning and decision-making. Consequently, products from the transportation planning process can be used in the NEPA analysis and documentation prepared for a transportation project.

#### **IV. LEGAL GUIDANCE ON HOW PRODUCTS FROM THE PLANNING PROCESS CAN BE USED IN THE NEPA PROCESS**

For studies, analyses or conclusions from the transportation planning process to be used in the NEPA process, they must meet certain standards established by NEPA. This is because the information and products coming from the planning process must be sufficiently comprehensive that the Federal government may reasonably rely upon them in its NEPA analysis and documentation. Transportation planning processes vary greatly from locality to locality. Some transportation planning processes will already meet these standards, while others might need some modification to do so. Below is a discussion of where products from the transportation planning process might be incorporated into a NEPA analysis and documentation (purpose and need, alternatives, affected environment, and, to a more limited extent, environmental consequences in terms of land use, indirect and cumulative impacts, etc.), along with the NEPA standards they must first meet.

In addition to what is discussed below, these planning products must come from a transportation planning process that complied with current transportation planning requirements (e.g., provided an opportunity for public involvement and considered relevant planning factors). Interested State, local, tribal and Federal agencies should be included in the transportation planning processes, and must be given a reasonable opportunity to comment upon the long range transportation plan and transportation improvement program. Finally, any work from the planning process must have been documented and available for public review during the planning process. Such documentation should be in a form that can easily be appended to the NEPA document or incorporated by reference.<sup>6</sup>

##### **Purpose and Need**

The “purpose and need statement” in a NEPA document is where the planning process and the NEPA process most clearly intersect. A sound planning process is a primary source of the project purpose and need. It is through the planning process that state and

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<sup>5</sup> Plaintiffs have appealed this decision, and the Ninth Circuit has stayed further construction on the project pending the outcome of the appeal. *Order Granting Stay*, Ninth Circuit Court of Appeals, No. CV-02-00578-PMP (July 27, 2004).

<sup>6</sup> Documents may be incorporated by reference if they do not impede agency or public review of the action. Any document incorporated by reference must be “reasonably available for inspection by potentially interested persons within the time allowed for comment.” Incorporated materials must be cited in the NEPA document and their contents briefly described. 40 C.F.R. 1502.21.

local governments determine what the transportation needs of an area are, which of transportation needs they wish to address, and in what time frame they wish to address them. Indeed, that is what the law requires from the planning process and actually prevents projects that do not come from the planning process from going forward.

The purpose and need statement, at a minimum, is a statement of the transportation problem to be solved by the proposed project. It is often presented in two parts: broad goals and objectives, and a description of the transportation conditions (congestion, safety, etc.) underlying the problem. The long-range transportation plan also includes goals and objectives similar to “purpose and need” but on a broader scale, since it typically covers a wider area and spans at least twenty years. These goals and objectives are often identified through extensive public outreach, sometimes called “visioning” or “alternative futures” exercises. The purpose and need statement for a transportation project should be consistent with and based on the goals and objectives developed during the planning process.

Getting input from Federal agencies as transportation goals and objectives are developed during the planning process is advisable and would be consistent with the cooperative relationship envisioned by statute and reinforced by courts. Such participation would give Federal agencies a better insight into the needs and objectives of the locality and would also provide an important opportunity for Federal concerns to be identified and addressed early in the process. These concerns could include issues that might be raised by Federal agencies in considering permit applications for projects designed to implement the transportation plan. However, the responsibility for local planning lies with the metropolitan planning organization or the State, not the Federal government.

In many cases, the goals and objectives in the transportation plan are supported by a needs assessment and problem statement describing current transportation problems to be addressed. Although the goals and objectives in the long-range transportation plan will be broader than what is appropriate for a specific project, they can be the foundation for the purpose and need to be used in a NEPA document. For example, they can be used to generate corridor-level purpose and need statements, during planning, for use in NEPA documents. The challenge is to ensure what comes from the long-range transportation plan is not so general as to generate a range of alternatives that are not responsive to the problem to be solved.

NEPA calls for a purpose and need statement to briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. A purpose and need statement can be derived from the transportation planning process. The purpose and need statement:

- Should be a statement of the transportation problem (not a statement of a solution);
- Should be based on articulated planning factors and developed through a certified planning process;
- Should be specific enough so that the range of alternatives developed will offer real potential for solutions to the transportation problem;
- Must not be so specific as to “reverse engineer” a solution; and

- May reflect other priorities and limitations in the area, such as environmental resources, growth management, land use planning, and economic development.

### Alternatives

Under NEPA, an EIS must rigorously explore and objectively evaluate all reasonable alternatives, and briefly explain the rationale for eliminating any alternatives from detailed study.<sup>7</sup> “Reasonable alternatives” are described in Council on Environmental Quality (CEQ) guidance as including “those that are practical or feasible from the technical and economic standpoint and using common sense.” *Forty Most Asked Questions Concerning CEQ’s NEPA Regulations*, Question #2a (March 23, 1981). An alternative is not “reasonable” if it does not satisfy the purpose and need,<sup>8</sup> but it may be reasonable even if it is outside the jurisdiction of the proposing agency to implement.

The transportation planning process frequently takes steps to refine the purpose and need statement that results in narrowing or screening the range of alternatives. Regional planning considerations may be the basis for refining the purpose and need statement, which might then have the effect of eliminating some alternatives from detailed consideration. For example, network connectivity across a geographic barrier such as a river may dictate a particular transportation mode or a general alignment. The plan may also identify where a locality wants housing, commercial development, agriculture, etc.—all of which might drive the need for transportation improvements in particular corridors.

When a long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives, a subarea or corridor study could be conducted to “zoom in” on a particular area. This study would evaluate alternative investment strategies, engineering constraints, fiscal constraints, and environmental considerations in this area, and could narrow the range of possible alternatives to those that will meet the goals and objectives of the broader long-range transportation plan in that particular subarea or corridor. At the conclusion of such a study, the remaining alternatives might simply consist of a single corridor or mode choice with location and design options.

On a broad scale, a decision about whether projects located in particular subareas or corridors would satisfy the transportation goals and objectives of a locality can be made in these subarea or corridor studies. These studies can therefore be used in and relied on in an EIS to refine the purpose and need statement, thereby narrowing the range of alternatives to be considered by eliminating some alternatives from further detailed study. When conducting subarea or corridor screening studies during the planning process, State

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<sup>7</sup> 40 C.F.R. 1502.14. The term “alternatives” is also used in many other contexts (for example, “prudent and feasible alternatives” under Section 4(f) of the Department of Transportation Act, the “Least Environmentally Damaging Practicable Alternative” under the Clean Water Act, or the “Alternatives Analysis” under FTA’s New Starts program). This memorandum only uses the term as defined under NEPA. At the planning stage of any project, however, a determination should be made as to whether the alternatives to be considered will need to be used to satisfy multiple requirements at the planning and NEPA review stages. If so, during planning the alternatives chosen for consideration and the analysis of those alternatives should reflect the multiple statutory objectives that must be addressed.

<sup>8</sup> In some cases, an alternative may be reasonable even if it just partially satisfies the purpose and need. See *NRDC v. Morton*, 458 F.2d 827, 836 (C.A.D.C. 1972).



and local agencies should keep in mind the principles of NEPA and should be sure to document their procedures and rationales. To be incorporated into an EIS, the analysis of alternatives conducted in the subarea or corridor study should be consistent with the standard of NEPA requiring consideration of reasonable alternatives. Alternatives that remain “reasonable” after the planning level analysis must be addressed in the NEPA process, even when they are clearly not the preferred alternative.<sup>9</sup> Alternatives passed over during the transportation planning process because they are infeasible or because they do not meet the NEPA “purpose and need” can be omitted from the detailed analysis of alternatives in the NEPA analyses and documentation, so long as the rationale for omitting them is documented in the NEPA document. That documentation can either be appended to the EIS or the specific transportation planning documents can be summarized in the EIS and incorporated by reference. The NEPA review would then have to consider the alternatives that survive the planning study, plus any additional reasonable alternatives identified during NEPA scoping that may not have been considered during the planning process. All reasonable alternatives considered in the draft and final EIS should be presented in a “comparative form” that sharply defines the issues and provides a clear basis for a choice by the decisionmaker and the public. 40 C.F.R. 1502.14.

Finally, any planning study being relied upon as a basis for eliminating alternatives from detailed study should be identified during the NEPA scoping process and available for public review. Since a major purpose of the scoping process is to identify alternatives to be evaluated, the public should be given the opportunity to comment on determinations made in the planning process to eliminate alternatives.

Therefore, if the planning process is used to screen or narrow the range of alternatives, by excluding certain alternatives from detailed study or by prescribing modes or corridors for transportation development which results in eliminating alternative modes or corridors from detailed study, then the planning-based analysis of alternatives:

- Should describe the rationale for determining the reasonableness of the alternative or alternatives;
- Should include an explanation of why an eliminated alternative would not meet the purpose and need or was otherwise unreasonable; and
- Should be made available for public review during the NEPA scoping process and comment period.

Under FTA’s New Starts program, the alternatives considered during the NEPA process may be narrowed even further by eliminating alternatives from detailed study in those instances when the Alternatives Analysis required by 49 U.S.C. 5309(e) is conducted as a

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<sup>9</sup> Under the requirements for FTA’s New Starts Program, however, under the appropriate circumstances, reasonable alternatives may be eliminated from detailed study during a rigorous planning-level Alternatives Analysis (including an evaluation of environmental consequences) conducted before the issuance of a NEPA Notice of Intent to prepare an Environmental Impact Statement. This is discussed later in this section.

planning study prior to the NEPA review.<sup>10</sup> In fact, FTA may narrow the alternatives considered in detail in the NEPA analysis and documentation to the No-Build (No-Action) alternative and the "Locally Preferred Alternative". The following criteria must be met if alternatives are eliminated from detailed study by a planning Alternatives Analysis conducted prior to the NEPA review:

- During the planning Alternatives Analysis, all of the reasonable alternatives under consideration must be fully evaluated in terms of their transportation impacts, capital and operating costs, social, economic, and environmental impacts, and technical considerations;
- There must be appropriate public involvement in the planning Alternatives Analysis;
- The appropriate Federal, State, and local resource agencies must be engaged in the planning Alternatives Analysis;
- The results of the planning Alternatives Analysis must be documented;
- The NEPA scoping participants must agree on the alternatives that will be considered in the NEPA review; and
- The NEPA document must incorporate by reference the evaluation of alternatives from the planning Alternatives Analysis.

If, during the NEPA process, new reasonable alternatives not considered during the planning Alternatives Analysis are identified or new information about eliminated alternatives comes to light, those alternatives must be evaluated during the NEPA process.

### **Affected Environment and Environmental Consequences**

The EIS must present a description of the environment in the area that would be affected by the proposed action and alternatives and their environmental consequences. 40 C.F.R. 1502.15 and 1502.16. In the development of the long-range transportation plan and a corridor or subarea studies, a similar assessment of the environment in the area and environmental consequences should typically have been conducted. Such planning-level assessments might include developing and utilizing geographic information system overlays of the area; providing information on air- and water-sheds; identifying the location of environmental resources with respect to the proposed project and alternatives; conducting environmental "scans" of the area of impact; and utilizing demographic trends and forecasts developed for the area. The discussion in the planning process of development growth, and consistency with local land use, growth management or development plans, as well as population and employment projections, would be particularly valuable for use in determining the affected environment and the scope of cumulative impacts assessment and possible indirect impacts of the proposed transportation improvement. Any relevant parts of such transportation planning process analyses, conducted in the planning process or by other sources and used in plan development, can be incorporated by reference and relied upon in the NEPA analysis and documentation.

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<sup>10</sup> FTA offers applicant sponsors the opportunity to conduct the Alternatives Analysis before NEPA begins or alternatively, to conduct the Alternatives Analysis concurrently with the NEPA DEIS.

The CEQ regulations require the action agency preparing an EIS to assess the environmental consequences of the proposed action and any reasonable alternatives. The CEQ regulation contains a detailed list of all of the types of environmental consequences that must be discussed, including direct, indirect and cumulative impacts and their significance, as well as means to mitigate adverse environmental impacts. These consequences must be discussed for each alternative and should be presented in a comparative form. 40 C.F.R. 1502.16. In transportation planning, the development of transportation plans and programs is guided by seven planning factors (23 U.S.C. 134(f)(1) and 23 U.S.C. 135(c)(1)), one of which is to “protect and enhance the environment, promote energy conservation, and improve the quality of life.” As such, there generally is a broad consideration of the environmental effects of transportation decisions for a region.<sup>11</sup> To the extent relevant, this analysis can be incorporated into the “environmental consequences” section of an environmental assessment or impact statement performed under NEPA. However, in most cases the assessment of environmental consequences conducted during the planning process will not be detailed enough to meet NEPA standards and thus will need to be supplemented.

Nonetheless, the planning process often can be a source of information for the evaluation of cumulative and indirect impacts required under NEPA. 40 C.F.R. 1502.16, 1508.7 and 1508.8. The nature of the planning process is to look broadly at future land use, development, population increases, and other growth factors. This analysis could provide the basis for the assessment of cumulative and indirect impacts required under NEPA. Investigating these impacts at the planning level can also provide insight into landscape, watershed or regional mitigation opportunities that will provide mitigation for multiple projects.

An EIS may incorporate information regarding future land use, development, demographic changes, etc. from the transportation planning process to form a common basis for comparing the direct, indirect and cumulative impacts of all alternatives. When an analysis of the environmental consequences from the transportation planning process is incorporated into an EIS it:

- Should be presented in a way that differentiates among the consequences of the proposed action and other reasonable alternatives;
- Should be in sufficient detail to allow the decisionmaker and the public to ascertain the comparative merits and demerits of the alternatives; and
- Must be supplemented to the extent it does not adequately address all of the elements required by the CEQ and FHWA/FTA NEPA regulations.

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<sup>11</sup> Specifically, the FHWA/FTA transportation planning regulations (23 C.F.R. Part 450 and 49 C.F.R. Part 613) require inclusion of the overall social, economic, energy and environmental effects of transportation decisions (including consideration of the effects and impacts of the plan on human, natural and man-made environment such as housing, employment and community development, consultation with appropriate resource and permit agencies to ensure early and continued coordination with environmental resource protection and management plans, and appropriate emphasis on transportation-related air quality problems). 23 C.F.R. 450.316(a)(13).

## **V. LEGAL GUIDANCE ON WEIGHT TO BE GIVEN TO PLANNING PRODUCTS INCORPORATED INTO NEPA ANALYSES AND DOCUMENTS**

Responsibility for NEPA analyses and documents on Federally-funded or approved highway and transit projects ultimately rests with FHWA and FTA, since they are taking the federal action subject to NEPA. FHWA and FTA have an obligation to independently evaluate and review a NEPA analysis and document, even when some of the information contained in it has been prepared by the State or other local agency. 42 U.S.C. 4332(2)(D); 40 C.F.R. 1506.5 Under NEPA and other relevant environmental laws such as the Endangered Species Act, the Clean Water Act, or the Clean Air Act, other agencies also must be given an opportunity to review and comment on NEPA documents and analysis. Federal agencies that have jurisdiction by law have an independent responsibility under NEPA and, upon the request of the lead agency, shall be “cooperating agencies.”<sup>12</sup> Tribes and state and local agencies with jurisdiction by law and all agencies with special expertise may, upon the request of the lead agency, be “cooperating agencies” in the NEPA process. 40 C.F.R. 1501.6 and 1508.5.

However, while imposing on Federal agencies the obligation to independently evaluate information in NEPA analyses and documents, Congress also affirmed that NEPA does not apply to the transportation planning process because it is not a Federal action:

“Since plans and programs described in this [transportation planning] section are subject to a reasonable opportunity for public comment, since individual projects included in the plans and programs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and programs described in this section have not been reviewed under such Act as of January 1, 1997, any decision by the Secretary concerning a plan or program described in this section shall not be considered to be a Federal action subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).”

23 U.S.C 134(o) and 135(i). The transportation planning process is a local function, which, by statute, is undertaken by State and local governments. The Department of Transportation has an oversight role, but it does not conduct the process and, therefore, there is no Federal action to trigger the application of NEPA. This is different than the “big picture” planning processes undertaken by other Federal agencies with respect to lands that they manage, where action by the Federal agency is involved and NEPA applies.<sup>13</sup>

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<sup>12</sup> Nonetheless, a cooperating agency may, in response to a lead agency’s request for assistance in preparing an EIS, reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is subject to the EIS. 40 C.F.R. 1501.6(c).

<sup>13</sup> For example, NEPA applies to the general management plans prepared and approved by the National Park Service for each unit of the National Park System (Chapter 2, “Management Policies,” at [www.nps.gov/policy/mp/chapter2.htm](http://www.nps.gov/policy/mp/chapter2.htm)), and applies to resource management plans prepared and approved by the Bureau of Land Management to maximize resource values of federal lands and resources (43 C.F.R. 1601.0-6).

The affirmation in Sections 134(o) and 135(i) that the decisions made by State and local governments during the transportation planning process are exempt from NEPA is based on a Fifth Circuit decision, *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5<sup>th</sup> Cir. 1979). In this case, plaintiffs sought declaratory judgment that an EIS was required for a regional transportation plan developed by the Atlanta Regional Commission in compliance with the FHWA and FTA planning regulations. The plan proposed a comprehensive transportation system for the Atlanta area. It included an analysis of projected regional transportation needs through the year 2000 and identified the general location and the mode (i.e. highway or transit) for recommended transportation corridors to meet those needs. The Fifth Circuit denied plaintiff's request for an EIS, finding that "Congress did not intend NEPA to apply to state, local or private actions; hence, the statute speaks only to 'federal agencies' and requires impact statements only as to 'major federal actions.'" 599 F.2d at 1344. Specifically, the Court stated:

"The fact is that the [regional plan] was developed by ARC in conjunction with state and local authorities, and no federal agency had any significant hand in determining, or made any decision concerning, its substantive aspects. Under the statutes, those decisions are entrusted to the state and local agencies, not FHWA or [FTA]. Moreover, the plan, as a plan will never be submitted to a federal agency for review or approval. And while the planning process was so structured so as to preserve the eligibility for federal funding of projects included within the resulting plan, it has been consistently held that the possibility of federal funding in the future does not make the project or projects 'major federal action' during the planning stage."

[Cites omitted] 599 F.2d at 1346. The Court further found that certification or funding of the planning process by FHWA and FTA did not amount to a "major federal action" as defined in the NEPA regulations. 599 F.3d at 1344; 40 C.F.R. 1508.18. The Court concluded by again emphasizing: "We have no doubt but that the [regional plan] embodies important decisions concerning the future growth of the Atlanta area that will have a continuing and significant effect on the human environment. But at the risk of belaboring the point, we reemphasize that those decisions have been made by state and local authorities, will not be reviewed by any federal agency, and obligate no federal funds. The defendants therefore need not prepare an impact statement on the [regional plan]." 599 F.3d at 1349.

This theme is echoed in other court decisions involving local planning processes. Early in the development of NEPA law, Courts recognized that deference to local planning was appropriate in the NEPA process. In *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029 (U.S. App. D.C. 1973), the Postal Service determined that the construction of a bulk mail facility would have no significant impact since, under the locality's zoning laws, the postal facility was a "permitted use" at the location proposed by the Postal Service. In analyzing this issue, the Court noted: "The question of significance takes on a distinctive case in the context of land use planning." The Court went on to state: "When local zoning regulations and procedures are followed in site location decisions by the Federal Government, there is an assurance that such 'environmental' effects as flow from the special uses of land—the safety of the

structures, cohesiveness of neighborhoods, population density, crime control, and esthetics—will be no greater than demanded by the residents acting through their elected representatives. ” 487 F.2d at 165-66. The Court acknowledged, however, that local planning was not sufficient to effectuate NEPA, and that actions of the Federal government might have implications beyond those evaluated in the planning process: “For example, whereas the Federal Government might legitimately defer to New York City zoning in matters of, say, population density, a different issue would be posed by the location within the city of an atomic reactor. Its peculiar hazards would not be limited to the citizens of New York, nor could they be controlled by them.” 487 F.2d at 166. *See also Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (C.A. Idaho 1982) (citing *Maryland-National Capital Park* and upholding a finding of no significant impact when a Federal project conformed to existing land use patterns, zoning and local plans).

The Fifth Circuit followed a similar line of reasoning in *Isle of Hope Historical Association v. U.S. Army Corps of Engineers*, 646 F. 2d 215 (5<sup>th</sup> Cir. 1981). In this case, the Court held that, in preparing an EIS, the Corps of Engineers properly relied on information and answers from the local government regarding planning and zoning issues. The Corps had consulted with county officials to determine whether planning documents had been adopted and whether there was any inconsistency between the proposed project and the local zoning regulations. Plaintiffs challenged this part of the EIS, alleging that it had not adequately discussed the planning documents at issue nor disclosed inconsistencies between the zoning regulations and the proposed project. The Court upheld the Corps’ reliance on the county officials’ responses, stating that “For the Corps in this case to follow planning documents which the county had not adopted or to engage independent analysis of inconsistencies which those specifically charged with zoning enforcement did not find would make the Corps in effect a planning and zoning review board....The proper function of the Corps was to assess the environmental impact of the [proposed project], not to act as a zoning interpretation or appeal board.” 646 F.2d at 221.<sup>14</sup>

This respect for local sovereignty in making planning decisions has been reinforced more recently in the context of transportation planning. In *North Buckhead Civic Association v. Skinner* (discussed previously in Section III of this Memorandum), the 11<sup>th</sup> Circuit emphasized that “NEPA does not confer the power or responsibility for long range local planning on Federal or state agencies.” 903 F. 3d at 1541-42. *See also Sierra Club v. U.S. Department of Transportation*, 350 F.Supp.2d 1168, 1193 (D. Nevada 2004), where the Court said: “[A] federal agency does not violate NEPA by relying on prior studies and analyses performed by local and state agencies.” This approach is also consistent with the statutory provision describing the Federal-State relationship for the Federal-aid highway program: “The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed.” 23 U.S.C.

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<sup>14</sup> Of course, the reliance on the underlying local plan does not excuse the analysis of the impacts of the project within the context of that plan. Cf. *Sierra Club Illinois Chapter v. U.S. Department of Transportation*, 962 F. 2d 1037, 1042 (N.D. Ill. 1997).

145(a). In conducting its NEPA analysis, FHWA and FTA must take into account Congressional direction regarding its statutory authority to act. See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (C.A.D.C. 1991).<sup>15</sup>

When it enacts a provision of law, Congress is presumed to have in mind previous laws relating to the same subject matter. To the greatest extent possible, new statutes should be read in accord with prior statutes, and should be construed together in harmony. N. Singer, *Statutes and Statutory Construction*, 6<sup>th</sup> Ed., Vol. 2B, Sec. 51.02. A Federal agency's independent obligation to evaluate planning products incorporated into the NEPA process must be performed in a way that is consistent with the Congressional direction that NEPA does not apply to local transportation planning and consistent with court decisions recognizing the sovereignty of local governments in making local transportation planning decisions. Federal agencies should ensure transportation planning decisions have a rational basis and are based on accurate data, but should not use the NEPA process as a venue for substituting federal judgment for local judgment by requiring reconsideration of systems-level objectives or choices that are properly made during the local transportation planning process.<sup>16</sup>

The transportation planning process and the NEPA process work in harmony when the planning process provides the basis or foundation for the purpose and need statement in a NEPA document. To the extent regional or systems-level analyses and choices in the transportation planning process help to form the purpose and need statement for a NEPA document, such planning products should be given great weight by FHWA and FTA, consistent with Congressional and Court direction to respect local sovereignty in planning. This approach is also consistent with a letter to Secretary Mineta dated May 12, 2003, from James Connaughton, Chairman of CEQ, on purpose and need statements in NEPA documents:

“Federal courts generally have been deferential in their review of a lead agency’s ‘purpose and need’ statements, absent a finding that an agency acted in an arbitrary or capricious manner. They have recognized that federal agencies should resect the role of local and state authorities in the transportation planning process and appropriately reflect the results of that process in the federal agency’s NEPA analysis of purpose and need [citing to *North Buckhead*].”

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<sup>15</sup> In this case, plaintiffs challenged the Federal Aviation Administration’s EIS on an application by the Toledo Port Authority for a cargo hub in Toledo. Plaintiffs alleged that the FAA should have considered alternatives outside of Toledo. The Court disagreed, finding that Congress had made clear that the location of cargo hubs was to be made by local authorities and not by the Federal government, stating: “Where the Federal government acts, not as a proprietor, but to approve and support a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited. In the latter instance, the Federal government’s consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.” 938 F.2d at 197.

<sup>16</sup> This would not constrain the Environmental Protection Agency’s authority under Section 309 of the Clean Air Act to refer concerns to the President’s Council on Environmental Quality regarding impacts on public health or welfare or environmental quality. 42 U.S.C. 7609.

Further, in his letter, the Chairman states that, even though other Federal agencies must be provided an opportunity to comment, they “should afford substantial deference to the transportation agency’s articulation of purpose and need” when the proposal is a transportation project.<sup>17</sup>

Therefore, if transportation planning studies and conclusions have properly followed the transportation planning process, then they can be incorporated into the purpose and need statement and, further, can be used to help draw bounds around alternatives that need to be considered in detail. For example, if systems-level or other broad objectives or choices<sup>18</sup> from the transportation plan are incorporated into the purpose and need statement used in a NEPA document, FHWA and FTA should not revisit whether these are the best objectives or choices among other options. Rather, their review would include making sure that objectives or choices derived from the transportation plan were based on transportation planning factors established by federal law; reflect a credible and articulated planning rationale; are founded on reliable data; and were developed through a transportation planning process meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the objectives and choices must be documented and included in the NEPA document. In such cases, alternatives falling outside a purpose and need statement derived from objectives or choices identified in the planning process do not need to be considered in detail.

FHWA and FTA should independently review regional analyses or studies of transportation needs conducted during the transportation planning process at a similar level. FHWA and FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable and scientifically acceptable. This review would include determining whether assumptions have a rational basis and are up-to-date and data, analytical methods, and modeling techniques are reliable, defensible, and reasonably current. This approach preserves the sovereignty of state and local governments in making local planning decisions but in a way that is consistent with the principles and procedures of NEPA.

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<sup>17</sup> See, also, *Citizens Against Burlington, Inc. v. Busey, id.*, At 938 F.2d 190, 195-96 (C.A.D.C. 1991), stating “When an agency is asked to sanction a specific plan, see 40 C.F.R. § 1508.18(b)(4), the agency should take into account the needs and goals of the parties involved in the application. [Citations omitted];” *Louisiana Wildlife Federation, Inc. v. York*, 761 F.2d 1044 (5<sup>th</sup> Cir. 1985), stating “Under [the Corps’] Guidelines, therefore, not only is it permissible for the Corps to consider the applicant’s objective; the Corps has a duty to take into account the objectives of the applicant’s project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.”

<sup>18</sup> Examples of such planning objectives or choices that courts have accepted for use in the purpose and need statement for a NEPA document are (1) the need for a multi-lane highway connecting two other highways (*North Buckhead Civic Association v. Skinner*, 903 F.2d at 1537) and (2) the need for a particular level of service (*Carmel-by-the-Sea v. U.S. DOT*, 123 F.3d at 1156). In *Atlanta Coalition on the Transportation Crisis v. Atlanta Regional Commission*, the court discusses the distinction between “systems” planning and “project” planning, and describes the Atlanta “systems” plan as “an analysis of projected regional transportation needs through the year 2000 [identifying] the general location and the mode (i.e., highway or mass transit) of recommended transportation corridors to meet those needs.” 599 F.2d at fn.2 and at 1341.



Nonetheless, additional scrutiny may be required if the results of the planning process are more specific than needed for regional or systems-level planning. Such results might actually be part of project development, which is outside of the planning jurisdiction of local agencies. Project development often involves a Federal action and therefore would be subject to NEPA. See 23 U.S.C. 134(o) and 135(i). In addition, the information the Federal agencies rely upon in the NEPA process based on underlying transportation planning work cannot be inaccurate, false or misleading. See *Sierra Club v. U.S. Army Corps of Engineers*, 701 F. 2d 1011, 1035 (where the court required a supplementation or re-evaluation of the NEPA analyses and documentation where the Corps unquestioningly relied on inaccurate information and did not investigate, on its own, the accuracy of the fisheries data submitted to it to support a permit for a landfill in the Hudson river to accommodate the Westway highway project.)

In conducting reviews under NEPA, Federal agencies should defer to planning products incorporated into the NEPA process to the extent that they involve decisions or analysis within the jurisdiction of the local planning agency. The focus of the Federal agency's review should be whether the planning information is adequate to meet the standards of NEPA, not whether the decisions made by the planning authority are correct. This would be consistent with the specific roles assigned by Congress to local and Federal authorities and consistent with court decisions admonishing Federal agencies to respect the sovereignty of local authorities in developing local plans.

## **VI. CONCLUSION**

This memorandum provides guidance on how transportation planning level information and products may be used to focus the documentation prepared to comply with NEPA when Federal approvals are needed to build a transportation project. Federal law and regulations and best practices ensure that much information that is relevant to the NEPA process is in fact developed during the planning process. Both Federal transportation law and NEPA law strongly suggest that to the extent practicable, the NEPA process should use and build on the decision made and information developed during the planning process. Of course, where the transportation planning process fails to address or document issues, the NEPA analyses and documentation may have to supplement the information developed during the planning process.

Original signed by D.J. Gribbin and Judith S. Kaleta